Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1546

NO. _____

ADOLIO LAZARO CRUZ,
CHARLES VICTOR McCUTCHEON,
DAVID KRIS SANDLIN
AND
JAMES VINCENT FEENEY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision	2
Statement of the Case	2
Reasons Relied Upon for the Allowance of the Writ	4
Conclusion	7
Appendix A (Opinion of the United States Court of Appeals, Fifth Circuit, dated March 3, 1977)	9
Appendix B (Opinion of the United States Court of Appeals, Fifth Circuit, dated March 3, 1977)	10

LIST OF AUTHORITIES

CASES	Page
Hagen v. United States, 5 F.2d 965 (C.A. 8th Cir. 1925)	6
Jones v. United States, 362 U.S. 309, 80 S.Ct. 725 (1960)	5, 6
Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968)	7
United States v. Scheffer, 463 F.2d 567 (C.A. 5th Cir. 1972)	5, 6
United States v. Woodall, 438 F.2d 1317 (C.A. 5th Cir. 1970)	6
UNITED STATES CONSTITUTION	
Amendment IV	2
UNITED STATES STATUTES	
21 U.S.C., Section 841(a)(1)	2
28 U.S.C., Section 1254(1)	2
TEXT	
22A C.J.S., Criminal Law Section 657(20)	7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on March 3, 1977.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A of this petition. It has not yet been reported and will not be.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether an individual charged with possession and conspiracy to possess with intent to distribute marijuana has standing to object to the introduction of such contraband found in premises where he was present, but over which premises he exercises no ownership, interest or control.

CONSTITUTIONAL PROVISION

The constitutional provision involved is Amendment IV to the Constitution of the United States. It provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Appellants were indicted in 75-C-63 in two counts for (1) conspiracy to possess with intent to distribute marijuana in violation of Title 21, U.S.C. Section 841(a)(1), and (2) possession with intent to distribute marijuana, a violation of Title 21, U.S.C., Section 841(a)(1).

A Motion for Judgment of Acquittal was made on behalf of Appellants based upon an insufficiency of the evidence to present a jury issue. Such Motion was made after the government rested and prior to presentation of appellants' case, and was urged again at the close of appellants' case. The Trial Court denied the motion. The jury returned a verdict of guilty as to all appellants on both counts.

Appellant Adolio Lazaro Cruz was sentenced to three (3) years with a Special Parole Term of two (2) years as to counts 1 and 2 of the indictment, said sentence to run concurrently. Appellant Charles Victor McCutcheon was sentenced to five (5) years with a Special Parole Term of three (3) years as to counts 1 and 2, said sentence to run concurrently. Appellant James Vincent Feeney was sentenced to five (5) years with a Special Parole Term of three (3) years, said sentence to run concurrently. Appellant David Kris Sandlin was sentenced to five (5) years with a Special Parole Term of three (3) years as to Counts 1 and 2, said sentence to run concurrently.

At approximately 6:40 A.M. on March 27, 1975, government agents took up surveillance of a house located at 5422 Old Brownsville Road, Corpus Christi, Texas. Surveillance was maintained from 6:40 P.M. until approximately 10:10 P.M. at which time a search warrant was served on Oscar Salazar Guerra, the owner or person in control of the property.

Three vehicles were observed entering the area during the surveillance and the same vehicles left the area prior to the serving of the search warrant. While some movement of people was seen during the surveillance, no one

was identified moving, loading, unloading, weighing or working with the marijuana. As the government agents drove into the area in three vehicles at approximately 10:10 P.M., a co-defendant, not one of the appellants herein, was honking the horn in a car near the house.

Six agents alighted from the government vehicles, proceeding to apprehend eight individuals present at the property. Appellants Cruz, Feeney and Sandlin were arrested in the garage. Appellant McCutcheon was arrested in the house. Marijuana was found in the garage area and in a locked filing cabinet in the house. Marijuana sweepings were found on a desk located in the house.

At no time was any one of appellants seen in actual possession of any of the contraband. There was no testimony that any of the appellants carried, loaded, unloaded, sold, bought, discussed buying or selling, or in any way exercised control, dominion or custody over any of the contraband.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The trial court committed reversible error in overruling appellants' objection to the introduction of the contraband.

Counsel for appellants duly and timely objected to the introduction into evidence of the contraband for which appellants were charged with possession and conspiracy to possess with intent to distribute. The trial court erroneously overruled said objection.

Appellants have standing to challenge validity of the search and seizure of the contraband found at 5422 Old Brownsville Road. When a defendant is indicted for pos-

session or conspiracy to possess contraband found as the result of a search of a place where he is present, he has standing to challenge the validity of such search even though he does not own the property searched or the seized contraband. *Jones v. United States*, 362 U.S. 309, 80 S.Ct. 725 (1960).

> "[T]o hold to the contrary, that is to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time . . . It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." *Jones v. United States*, supra, at p. 263, p. 732.

In the case at bar appellants were present at 5422 Old Brownsville Road at the time of the search which located the contraband. They were all arrested at the scene of the search. At no time did any of them claim ownership or possession of the premises searched or the contraband. However, each appellant was indicted in 75-C-63 in count one of conspiracy with intent to distribute the seized contraband and in count two with possession of said contraband. Therefore, under the rule of *Jones v. United States*, appellants have proper standing to challenge the validity of the search.

The Fifth Circuit recently recognized this principal in *United States v. Scheffer*, 463 F.2d 567 (C.A. 5th Cir.

1972). A warrantless search of a house owned by Scheffer was held to be illegal. A co-defendant named Collins was present in the house at the time of the search. "We also hold, on the strength of *Jones v. United States*, supra, that Collins has standing for the reason that he was a guest and a lawful occupant in Scheffer's house."

The premises searched, 5422 Old Brownsville Road, was a private dwelling. "It is, of course, an elementary constitutional principle that police officers must go before a neutral government official and obtain a search warrant before intruding into a private dwelling." *United States v. Scheffer*, supra.

Although government witnesses testified repeatedly to a search warrant which was served on the defendant Oscar Salazar Guerra, at no time was such instrument brought before the court or introduced into evidence. Furthermore, there was no testimony explaining the absence of the search warrant. In *Hagen v. United States*, 5 F.2d 965 (C.A. 8th Cir. 1925) when "neither this warrant, nor a copy, served at the time of arrest, nor the affidavit upon which it issued was produced," the court held that it was insufficient.

The Fifth Circuit in *United States v. Woodall*, 438 F.2d 1317 (C.A. 5th Cir. 1970), recently affirmed the principle at the root of *Hagen v. United States*, supra, that where a party conceals evidence, "the settled law of this circuit permits an inference to be drawn that the testimony so concealed would be unfavorable to the person who sequesters it." at p. 1327. Although the government had the search warrant and affidavit upon which it issued, it failed to offer it into evidence, thus

concealing it from the court. Therefore, an inference of invalidity arises as to the search warrant.

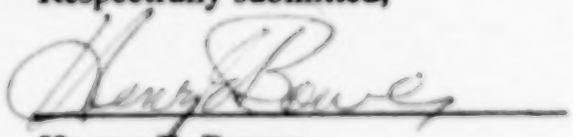
Furthermore, in order to introduce contraband into evidence, a legal predicate must be laid showing it to be properly admissible. "In jurisdictions where evidence obtained as a result of an illegal search is incompetent against accused, it has been held that to render admissible evidence obtained by a search a legal foundation must be laid." 22A C.J.S., Criminal Law Section 657(20). It is clear that the federal courts follow the rule that evidence obtained as the result of an illegal search must be excluded from the trial. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968), at p. 969, 974.

Since no search warrant was introduced into evidence, nor its absence from evidence explained, and no testimony showing any justification for a warrantless search presented, a proper predicate was not laid for the introduction of the contraband into evidence. Thus, the trial court reversibly erred in overruling appellants' objection to the introduction of said contraband into evidence.

CONCLUSION

For the reasons given above, a Writ of Certiorari should be granted.

Respectfully submitted,



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Attorney for Petitioners

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4360

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY, RAYMOND RIVERA, AND MANUEL SILGUERO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

---

(March 3, 1977)

BEFORE GOLDBERG, CLARK and FAY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4360

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY, RAYMOND RIVERA, AND MANUEL SILGUERO,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(March 3, 1977)

BEFORE GOLDBERG, CLARK and FAY,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Issued as Mandate: March 25, 1977

(AS TO ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, JAMES VINCENT FEENEY and MANUEL SILGUERO ONLY)

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, AND JAMES VINCENT FEENEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1546

ADOLIO LAZARO CRUZ, CHARLES VICTOR McCUTCHEON, DAVID KRIS SANDLIN, AND JAMES VINCENT FEENEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence against them was improperly admitted at trial in the absence of proof that the evidence was legally obtained.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possession of marijuana with intent to distribute and of conspiracy to commit that offense in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Cruz was sentenced to three years' imprisonment to be followed by two years' special parole. Petitioners McCutcheon, Sandlin and Feeney were each sentenced to five years' imprisonment to be followed by three years' special parole. The court of appeals affirmed *per curiam* (Pet. App. A).

On March 27, 1975, agents of the Drug Enforcement Administration, acting under a search warrant, raided a house near Corpus Christi, Texas, and seized approximately 721 pounds of marijuana. Petitioner Cruz was arrested in the garage, which housed approximately 345 pounds of marijuana stacked in kilo-sized bricks. Petitioner Sandlin was apprehended while climbing a back wall and petitioner Feeney was found hiding behind a table containing a large number of the marijuana bricks (Supp. R. 72-78, 153-155, 163, 209-212). Petitioner McCutcheon was arrested in the living room, where agents also found 38 pounds of marijuana bricks locked in a desk; a search of McCutcheon produced approximately $12,000 in cash (Supp. R. 219-220).

1. Petitioners were indicted on June 11, 1975, together with four other men, including Oscar Guerra. On September 11, 1975, Guerra's motion for severance was granted, and petitioners' trial commenced with the selection and swearing of a jury and the court's rendition of preliminary instructions. The trial was then recessed until September 30, 1975, and, thereafter, until October 22, 1975.

On that date, as the trial was about to resume, petitioners moved to suppress the marijuana heretofore described. The court denied the motion because it was untimely and no good reason was offered for its tardiness (App. 3a-4a).[1] The court also denied petitioners' subsequent oral request to argue a suppression motion filed by Guerra on July 7, 1975, because that request was also untimely and because Guerra had been severed from the case (App. 2a).[2] After the court denied their motions, petitioners did not object to the admission into evidence

[1]"App." denotes the district court order filed November 6, 1975, which we have attached as an appendix to this memorandum.

[2]The case against Guerra was dismissed on the government's motion on December 17, 1975, after he pleaded guilty to state charges arising from the same facts.

of the marijuana, although they did object to testimony concerning the arrival of the government agents at the house and their observations there.

2. There is no merit to petitioners' contention (Pet. 5-7) that the absence of proof that the seizure of the marijuana was legal made its admission into evidence improper. The government is not obliged to show at trial that its evidence was properly obtained. If a defendant desires to challenge the legality of the government's proof, the burden rests upon him to make a pre-trial motion to suppress. Under the pertinent Rules of Criminal Procedure in effect at the time of petitioners' trial (as well as their predecessor provisions and the current Rules), a defendant who neither makes a suppression motion, nor demonstrates good cause for failing to do so, waives his challenge.[3] The district court specifically noted that petitioners did not make the required motion prior to trial, and that they have never suggested any cause for their failure to do so (App. 2a-4a):

> During the discussion concerning the [motions to suppress] made by the several Defendants, and prior to the Court's denial of the requests, the Court was

[3]Under the current provisions, Rules 12(b)(3) and (f), Fed. R. Crim. P., which became effective December 1, 1975, a motion to suppress "must be raised prior to trial," and failure to do so "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

The counterpart provisions in effect at the time of petitioners' trial were Rules 41(f) and 12, Fed. R. Crim. P. While those provisions were not as explicit as the current or predecessor Rules, they have been consistently held to state the same requirements. *E.g., United States* v. *Mauro*, 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991; *United States* v. *Farnkoff*, 535 F. 2d 661 (C.A. 1); *United States* v. *Sisca*, 503 F. 2d 1337, 1349 (C.A. 2), certiorari denied, 419 U.S. 1008; cf. *United States* v. *Barber*, 495 F. 2d 327 (C.A. 9). See generally *Segurola* v. *United States*, 275 U.S. 106, 112.

reminded that early in a pre-trial hearing held in July, it had been advised by counsel for the Defendants that there would be no need for any hearings in advance of trial. And, the Court was further advised that the courtroom clerk had contacted the attorneys for the Defendants a few days previously and had been advised there were no matters requiring hearings before the evidence was commenced. * * *

* * * * *

All of the Defendants were aware from the start of the basic nature of the contraband in this case and were aware for a period of over five weeks that the Defendant Guerra * * * had been severed and a separate trial would be held as to him.

* * * * *

> * * * [T]he unexplained, last-minute delay [in raising the suppression motion] would have required the additional time of this Court and the already selected jury. In addition, it would have created serious inconvenience and interruption of normal and previously scheduled judicial processes. No adequate explanation was made for failure to timely file.

Petitioners did not object to the government's acquisition of the marijuana until their trial was underway, although they were aware from the start of the nature of the government's case, and although during the several months since the indictment had been filed they repeatedly assured the court that no hearings would be required.

Under the circumstances, the trial court properly denied the suppression motion as untimely.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

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[4]Petitioners claim (Pet. 2) that the decisions below present the issue of their standing to object to the seizure. In fact, since petitioners failed to raise a proper objection to the seizure, the trial court had no occasion to address any possible standing issues and there is no reason for this Court to consider them now.

APPENDIX

ORDER

"The indictment in this case was returned on June 11, 1975. On July 7, 1975, a motion to suppress was filed on behalf of the Defendant Oscar Guerra. On September 8, 1975, the Defendant Rivera filed his motion to suppress. On September 11, 1975, this case was called for jury selection. At that time, all Defendants announced ready, except Defendant Guerra, who waived his constitutional right to a trial by jury and agreed to go to trial before the Court. The Court granted a severance to Guerra. Thereupon, and on the same date, the jury in this cause was selected and sworn and, after the jury was given a short precautionary instruction, the trial of the case was recessed until September 30, 1975, at which time it was anticipated the testimony would commence. However, the recess was, thereafter, extended to October 22, 1975.

"On the appointed date, the Defendants Garza, Cruz, McCutcheon, Sandlin and Feeney, represented by John J. Pichinson, and Defendant Silguero, represented by Albert Huerta, and Defendant Rivera, represented by Albert A. Pena, III, appeared before the Court. At the time the Court convened, there were no motions before the Court except Rivera's motion to suppress which had been filed in early September, 1975. We are not concerned with that motion now.

"After a brief investigation as to the possibility of a conflict of interest arising in a single attorney's representation of five of the Defendants, the Court, upon Mr. Pichinson's representation that he had considered the matter and discussed it with his clients and saw no possible conflict, and the concurrence in this by the Assistant United States Attorney prosecuting this case, was prepared to proceed and bring the previously selected jury into the courtroom.

"There was, however, further delay when counsel for the five Defendants, in open court and before the jury was seated, tendered a short, written motion to suppress evidence in the case. The Court considered it as not timely, since the trial was already in progress, and denied the requested filing for any purpose. Thereafter, all of the Defendants orally requested the Court to hear, at this time, the motion to suppress which had been filed by the Defendant Oscar Guerra in this cause before his case was severed. This request was denied because the motion was not before the Court; the request was an attempt, by subterfuge, to circumvent the Court's prior rulings; these Defendants had no standing to make such a request; and, also, because it was untimely made.

"During the discussion concerning the requests made by the several Defendants, and prior to the Court's denial of the requests, the Court was reminded that early in a pre-trial hearing held in July, it had been advised by counsel for the Defendants that there would be no need for any hearings in advance of trial. And, the Court was further advised that the courtroom clerk had contacted the attorneys for the Defendants a few days previously and had been advised there were no matters requiring hearings before the evidence was commenced. While the Court orally overruled the motions at the time they were presented, as above outlined, the Court has utilized this formal order to explain more fully and clarify for the record the factual background and rationale of the rulings.

"The motion to suppress which had previously been filed by the Defendant Rivera was before the Court, but it was not directed to the same matter as the Guerra motion had been, and it was not directed to the same matter that was involved in the motion first presented to the Court on this date and above discussed. The Rivera

motion was directed at the search of an automobile belonging to said Defendant. No action was taken on the motion, based upon the representations of the Assistant United States Attorney that he did not intend to offer any testimony objected to in said motion, and the acknowledgement by the attorney for Rivera that he understood this to be the case.

"All of the Defendants were aware from the start of the basic nature of the contraband in this case and were aware for a period of over five weeks that the Defendant Guerra had waived his right to a jury trial and would present his case to the Court, and that such Defendant had been severed and a separate trial would be held as to him.

"Rule 41(f) of the Federal Rules of Criminal Procedure provides that motions to suppress may be made 'as provided in Rule 12.' Prior to 1972, Rule 41 (e) specifically required that motions to suppress be filed prior to trial, and on December 1, 1975, less than a month from this day, the new amendment to the Federal Rules will go into effect, and they also have an explicit requirement that such motions be filed prior to trial. See Advisory Committee Note to the Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 12. While the 1972 amendments, which are still in effect, restructured Rule 41 and omitted the specific language concerning a pre-trial deadline for such motions, it has been convincingly demonstrated that no change in that traditional requirement was intended. See *United States* v. *Mauro*, 507 F. 2d 803 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

"This rule effects important policies. In this case, the unexplained, last-minute delay would have required the additional time of this Court and the already selected

jury. In addition, it would have created serious inconvenience and interruption of normal and previously scheduled judicial processes. No adequate explanation was made for failure to timely file.

"The Court, by this order and for the reasons set forth, here specifically denies the several requests of the Defendants which were previously orally and in open court denied. IT IS SO ORDERED.

"SIGNED this 6th day of November, 1975.

"/s/ OWEN D. COX
"United States District Judge"

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